



DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 233

[Docket ID: DOD-2019-OS-0103]

RIN 0790-AK90

Federal Voting Assistance Program (FVAP)

AGENCY: Office of the Under Secretary of Defense for Personnel and Readiness, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is finalizing policy for the Federal Voting Assistance Program (FVAP) based on a March 6, 2020, interim final rule. The FVAP assists overseas Service members and other overseas citizens with exercising their voting rights by serving as a critical resource to successfully register to vote.

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION, CONTACT: David Beirne, (571) 372-0727.

SUPPLEMENTARY INFORMATION:

Background

In the March 6, 2020, interim rule (85 FR 13045), DoD proposed amendments to:

- Include the United States Maritime Administration (MARAD) under agreement with the Department of Transportation and the United States Postal Service (USPS).
- Require DoD components to establish component-wide programs to communicate and disseminate voting information, with the goal of improving communication and clarity for the impacted population.
- Require Federal Agencies to enter into memorandums of understanding (MOU) with DoD to

provide accurate, nonpartisan voting information and assistance to ensure military and overseas voters understand their voting rights, how to register and apply for an absentee ballot, and how to return their absentee ballot successfully.

Legal Basis

The FVAP administers the Uniformed and Overseas Citizens Absentee Act (UOCAVA) on behalf of the Secretary of Defense, as the Presidential designee under 52 U.S.C. 20301(a) and Executive Order (EO) 12642, “Designation of Secretary of Defense as Presidential Designee” (53 FR 21975, June 8, 1988).

United States citizens under UOCAVA include:

- Members and eligible family members of the Uniformed Services (Army, Navy, Marine Corps, Air Force, Space Force, Coast Guard, United States Public Health Service Commissioned Corps, and National Oceanic and Atmospheric Administration Commissioned Corps).
- Members of the Merchant Marine.
- U.S. citizens residing outside of the United States.

Under 52 U.S.C. 20506, State voter registration agencies must provide individuals the opportunity to register to vote or to change their voter registration data when they apply for or receive services or assistance. The Secretary of Defense, under 10 U.S.C. 1566, must prescribe regulations to require the Military Services (Army, Navy, Air Force, and Marine Corps) to implement voting assistance programs that comply with DoD directives.

Finally, 52 U.S.C. 22301(c)(1) requires Government departments, agencies, and other entities, upon the Presidential designee’s request to distribute balloting materials and cooperate in carrying out UOCAVA.

Additional information regarding internal DoD processes related to this program is contained in DoD Instruction 1000.04, “Federal Voting Assistance Program (FVAP),” which is publicly available at

<http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/100004p.pdf?ver=2017-12-01-105434-817>.

Discussion of Comments

Twelve comments were received on the interim rule. While one comment was not pertinent, a summary of the remaining 11 comments and the Department's responses are below.

Five comments expressed favor for the rule change, with statements "like it affirms that the government can at least do something right and still protect overseas citizens' and military personnel's right to vote", "including people from the military and people who are overseas to participate in voting is a good idea because everyone should have an opportunity to vote even if they don't want to", and "would prompt and increase the voting turnout of young voters, who are defending the interests of America...finally increase the education of voting to a certain demographic who may not get that form of information on a regular base due to the nature of their work."

Four comments asked for more participation from the states supporting outreach efforts such as providing more information so voters can learn how to access their Secretary of State or County's webpage; ensuring closer collaboration between FVAP and the states to further legislation for voters to apply for a vote by mail ballot online directly; and improving processes to assist Service members and citizens overseas in remote locations where there can be significant communication challenges. One comment in particular, stated the rule should ensure voters on Formosa receive DoD assistance through the American Institute in Taiwan DoD attaches.

FVAP Response: In each Federal election cycle, the FVAP program reaches out to State and local election officials to obtain the most up to date voting information and publishes State specific information at <https://www.fvap.gov/>. It also works with these officials to link the FVAP website with State and local election websites.

FVAP, through the network of DoD and Department of State Voting Assistance Officers, takes the time and makes the effort to ensure military and overseas voters can cast their ballots successfully — from all over the world. The rule already ensures voters in Taiwan receive DoD voting assistance information through the American Institute in Taiwan and the Department of State. For example, the American Institute website provides FVAP's voting assistance information. See <https://www.ait.org.tw/u-s-citizen-services/voting/> and <https://www.ait.org.tw/offices/kaohsiung/messages-for-us-citizens-in-southern-taiwan/>. Voters may with any questions or requests may also contact the American Institute in Taiwan by email at VoteTaipei@state.gov.

One comment noted the overseas voting process includes the voter needing the ability to fill the ballot out, print, sign, and mail it in. This limits those voters that may not have Internet access, access to a printer, envelopes, stamps, or access to a post office. Expecting those stationed overseas to be able to keep up with primary elections and the process of registering and how and when to vote is not practical for most military members, as well as citizens who are out of the country.

FVAP Response: As states administer elections in the United States, their statutes and regulations define the rules for acceptance for voter registration requests, absentee ballot requests, and voted ballots. Currently, Federal law mandates states to provide blank ballots to voters electronically upon request. The forms prescribed by FVAP facilitate this process for all Federal elections, inclusive of primary elections.

One comment stated that the Department violated the Congressional Review Act by beginning to implement the rule before the 60-day mandate ended.

FVAP Response: The Department disagrees. The Congressional Review Act defines a major rule as one that has resulted in or is likely to result in:

- (1) an annual effect on the economy of \$100 million or more;

(2) a major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies, or geographic regions; or

(3) significant adverse effects on competition, employment, investment, productivity, or innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

This rulemaking makes a substantive impact upon how the Government will offer voting assistance, but it is not economically significant pursuant to the Congressional Review Act. It does not annually affect the economy in an amount of \$100 million or more, does not increase costs to States and localities who administer elections, and does not adversely affect U.S. entity competition with foreign-based enterprises in domestic and export markets. Thus, the 60-day mandate under the Congressional Review Act does not apply.

Summary of Changes and Exception to Notice and Comment

Based on the public comments received, DoD is not making any changes to the interim rule. However, the definition of *Uniformed services* in §233.3 is being revised to include the “Space Force,” as shown in the regulatory text of this final rule.

This regulation can be effective, notwithstanding the general requirement in the Administrative Procedure Act (APA) for advance notice and comment. This rule is exempt from the APA’s notice-and-comment requirement, because it satisfies the good-cause exception. 5 U.S.C. 553(b)(B). Specifically, notice-and-comment rulemaking is “unnecessary,” *id.*, because adding “Space Force” simply recognizes the Title 10 definition of *Uniformed services* that includes the sixth independent U.S. military service branch, which became law December 20, 2019, as part of the 2020 National Defense Authorization Act. DoD has therefore, concluded that there is good cause to dispense with the advanced notice-and-comment rulemaking requirements in 5 U.S.C. 553 to include “Space Force” in the definition of *Uniformed services*. The amendment to this definition will ensure that members of the U.S. Space Force are fully aware of their voting rights.

Expected Impact of the Final Rule

Finalizing current policies helps to establish a uniform framework within the Government on how to interact and disseminate communications with impacted populations overseas such as maximizing awareness of UOCAVA eligibility and providing resources to the impacted public populations. Entering into MOUs with other Federal Agencies will allow FVAP to strengthen its communications by expanding its outreach through other Federal Agencies. This will allow agencies to link to the FVAP.gov website and augment existing voter assistance information. These efforts boost voter awareness, education, and participation.

For example, including MARAD under agreement with the Department of Transportation will allow the FVAP to better serve Merchant Marine uniformed Service members, because MARAD will directly coordinate FVAP guidance and instructions to better communicate with Merchant Marine members about how to vote absentee under UOCAVA. USPS provides essential services to assure the distribution of balloting materials to eligible voters and voted ballots to election officials.

EO 14019, “Promoting Access to Voting”

On March 7, 2021, the White House released Executive Order 14019 on Promoting Access to Voting. The purpose of the Executive Order is to protect and promote the exercise of the right to vote, eliminate discrimination and other barriers to voting, expand access to voter registration and accurate election information, and ensure registering to vote and the act of voting be made simple and easy for all those eligible to do so. To accomplish this purpose, with this final rule DoD will facilitate the Executive Order in the following ways:

- Promoting opportunities to register to vote and participate in elections to include civilians working for the Department who vote locally;
- Distributing voter information and use of vote.gov in conjunction with fvap.gov website and current communications to support a comprehensive approach to voter awareness;

- Creating innovative solutions to reduce barriers and increase voter awareness of their status in the UOCAVA absentee voting process, including increased visibility of overseas ballots;
- Developing materials to support absentee voting by military and overseas U.S. citizens with limited English proficiency.

EO 12866, “Regulatory Planning and Review”; EO 13563, “Improving Regulation and Regulatory Review”

EOs 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). EO 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule is not a “significant regulatory action,” under Section 3(f) of EO 12866 and was not reviewed by the Office of Management and Budget (OMB).

Congressional Review Act, 5 U.S.C. 804(2)

Under the Congressional Review Act, a major rule may not take effect until at least 60 days after submission to Congress of a report regarding the rule. A major rule is one that would have an annual effect on the economy of \$100 million or more, or have certain other impacts. This rule is not a major rule under the Congressional Review Act.

Sec. 202, Pub. L. 104-4, “Unfunded Mandates Reform Act”

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1532) requires agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. This rule will not mandate any requirements for State, local, or tribal governments, nor will the rule affect private sector costs.

Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. 601)

The DoD certifies that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis.

Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)

It has been determined that 32 CFR part 233 does impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995. These information collections have been approved by OMB under the following control numbers: 0704-0502, “Federal Write-In Absentee Ballot (FWAB)” and 0704-0503, “Federal Post Card Application (FPCA).”

Executive Order 13132, “Federalism”

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a final rule that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This rule will not have a substantial effect on State and local governments.

Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments”

It has been determined that this rule does not have a substantial effect on Indian tribal governments. This rule does not impose substantial direct compliance costs on one or more Indian tribes, preempt tribal law, or effect the distribution of power and responsibilities between the Federal Government and Indian tribes.

List of Subjects in 32 CFR Part 233

Civil rights, Elections, Voting rights.

Accordingly, the interim rule amending 32 CFR part 233, which was published at 85 FR 13045, on March 6, 2020, is adopted as a final rule with the following changes:

PART 233—[AMENDED]

1. The authority citation for part 233 continues to read as follows:

Authority: E.O. 12642; 10 U.S.C. 1566a; 52 U.S.C. 20506; 52 U.S.C. Ch. 203.

2. Section 233.3 is amended by revising the definition of “Uniformed services” to read as follows:

§ 233.3 Definitions.

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Uniformed services. The Army, Navy, Air Force, Marine Corps, Space Force, and Coast Guard, the commissioned corps of the Public Health Service, and the commissioned corps of the National Oceanic and Atmospheric Administration.

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Dated: December 7, 2021.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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